REMARKS

A request for a two month extension of time and the fee for this requested extension are provided herewith. The claims have been amended herein, as may be appreciated from the above listing of claims. Support for the present amendments to the claims can at least be found in pages 18-20 of the specification. Authorization is provided herewith to pay any underpayment of fees or credit any overpayment of fees to Deposit Account No. 02-4800.

I.   RESPONSE TO REJECTION OF CLAIMS 25 AND 26

The Examiner rejected claims 25 and 26 as not being supported in the specification. (Office Action, at 3). Claims 25 and 26 are part of the application because they were added in a preliminary amendment filed with the application. For applications filed on or after September 21, 2004 (the effective date of 37 CFR 1.115(a)(1)), a preliminary amendment that is present on the filing date of the application is part of the original disclosure of the application. MPEP § 714.01(e). The present application and the preliminary amendment were filed on January 10, 2007 and were therefore filed after September 21, 2004.

The specification has been amended to include the contents of claim 25 and 26 within the specification. No new matter was added by this amendment to the specification. *See e.g.* MPEP § 2163.06. Indeed, the MPEP states that "claims as filed in the original specification are part of the disclosure and therefore, if an application as originally filed contains a claim disclosing material not disclosed in the remainder of the specification, the applicant may amend the specification to include the claimed subject matter. *In re Benno*, 768 F.2d 1340, 226 USPQ 683 (Fed. Cir. 1985)." MPEP § 2163.06.

10

The specification as amended supports claims 25 and 26. Withdrawal of the rejection of claims 25 and 26 is respectfully requested.

II.   RESPONSE TO REJECTION OF THE CLAIMS AS OBVIOUS

In the Office Action dated August 11, 2009 (hereafter "the Office Action"), the Examiner rejected claims 24-29, 31, 32, 44-51 and 53 as being rendered obvious in view of U.S. Patent Application Publication No. 2004/0158644 to Albuquerque et al. (Office Action, at 4).

Claims 33-34 were rejected as obvious in view of the combination of Albuquerque et al. and U.S. Patent Application Publication No. 2003/0097443 to Gillett et al. (Office Action, at 15).

Claim 52 was rejected as obvious in view of Albuquerque et al. and U.S. Patent No. 6,222,856 to Krishnan et al. (Office Action, at 16).

A.   Burden Of Proving Obviousness Under 35 U.S.C. § 103

"All words in a claim must be considered in judging the patentability of that claim against the prior art." MPEP § 2143.03 (emphasis added). "When evaluating claims for obviousness under 35 U.S.C. 103, **all the limitations of the claims must be considered and given weight.**" MPEP § 2143.03. "If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious." *Id.* "A 35 U.S.C. 103 rejection is based on 35 U.S.C. 102(a), 102(b), 102(e), etc. depending on the type of prior art reference used and its publication or issue date." MPEP § 2141.01.

To establish a *prima facie* case of obviousness, an Examiner must show that an invention would have been obvious to a person of ordinary skill in the art at the time of the invention. MPEP § 2141. "Obviousness is a question of law based on underlying factual inquiries." *Id.*

11

The factual inquiries enunciated by the Court include "ascertaining the differences between the claimed invention and the prior art" and "resolving the level of ordinary skill in the pertinent art." MPEP § 2141.

"A statement that modifications of the prior art to meet the claimed invention would have been 'well within the ordinary skill of the art at the time the claimed invention was made' because the references relied upon teach that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references." MPEP § 2143.01. "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, **there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness."** MPEP § 2143.01 (citing *KSR*, 82 USPQ2d at 1396) (emphasis added).

Moreover, "[i]f the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious." MPEP § 2143.01. Also, "the proposed modification cannot render the prior art unsatisfactory for its intended purpose." MPEP § 2143.01.

B. Claims 24-29, 31-34, And 44-47 Are Allowable

Claim 24 defines a method that includes triggering a bandwidth test. The bandwidth test comprises sending a bandwidth request to each terminal, registering a bandwidth of an associated part connection after each hop and receiving assembled data relating to bandwidth available for each terminal. Claims 25-29, 31-34 and 44-47 depend directly or indirectly from claim 24 and therefore also contain these limitations.

The cited art does not teach or suggest the bandwidth test recited in claim 24. For example, there is no bandwidth testing done in the system disclosed by Albuquerque et al. The Examiner states that Albuquerque et al. teaches a bandwidth test at paragraphs 27 and 28 (Office Action, at 5). To the contrary, Albuquerque et al. only teaches a computation of available bandwidth by a bandwidth manager overseeing a particular private network. The bandwidth manager taught by Albuquerque et al. would fail whenever other networks are traversed, such as the internet, because without a test there would be no information about available bandwidth. (*See e.g.* Figures 2 and 4, ¶¶ 21, 24-26).

C.   Claims 48-52 Are Allowable

Claim 48 requires a computer to include a network resource test device connected to at least one of the network resource allocation device, the performance characteristic providing device, and the network resource distribution memory. The network resource test device is configured to oversee a bandwidth test, the bandwidth test comprising sending a bandwidth request to each terminal, registering a bandwidth of an associated part connection after each hop in a communication path between each terminal and the computer, and receiving assembled data relating to bandwidth available for each terminal via the associated part connections in each communication path.

The cited art does not teach or suggest a network resource test device as required by claims 48-52. As discussed above with reference to claim 24, none of the cited art teach or suggest any running of any bandwidth test. Nor does the cited art teach or suggest a network resource test device configured to oversee such a test or a bandwidth test that includes registering a bandwidth of an associated part connection after each hop in a communication path between

13

each terminal and the computer, and receiving assembled data relating to bandwidth available for each terminal via the associated part connections in each communication path.

D. Claim 54 Is Allowable

Claim 54 defines a method for substantially real time transmission of a software component that includes the step of if the computed amount of available bandwidth resources is equal to or greater than an amount of bandwidth necessary to transmit the software component to the requesting terminal, reducing the at least one lower priority process such that the at least one lower priority process is still able to utilize some bandwidth and transmitting the software component to the requesting terminal.

None of the cited art teaches a reduction of a lower priority process such that that one or more lower priority processes are still operational. Indeed, the cited art teaches away from such a limitation. For example, Albuquerque et al. teach that any lower priority process be eliminated or rejected in the event a higher priority process requires all the bandwidth being used by that or reserved for that process to be released. (¶ 46, Figure 5).

III. CONCLUSION

For at least the above reasons, allowance of all pending claims is respectfully requested.

Respectfully submitted,

Dated: January 11, 2010

/Ralph G. Fischer/
Ralph G. Fischer
Registration No. 55,179
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 392-2121

Attorney for Applicant